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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO._____

FREDDIE GOLD and Wife, GOLDIE GOLD,

Petitioners,

v.

NATIONAL SAVINGS BANK
OF THE CITY OF ALBANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals
For The Sixth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether there was any material or substantial evidence presented so as to raise a material issue of fact from which the jury might have rationally found a verdict in favor of GOLD in answering the special interrogatory which required a finding that Architect Ronald R. Rucinski had committed fraudulent acts, or acts so obviously unjust as to imply bad faith or gross neglect when he made his determination that the Overton Square Apartment complex was not constructed in accordance with the plans and specifications submitted to BANK and was not constructed in a good and workmanlike manner.

GOLD answers "Yes."

2. Whether there was any material or substantial evidence presented so as to raise a material issue of fact to allow the Court to instruct the jury that "fraud on the part of Rucinski would exist if the proof showed that he was in collusion with the BANK to reject the loan upon a deceitful basis."

GOLD answers "Yes."

3. Whether the Court committed error in stating as an example of fraud, collusion between Architect Ronald R. Rucinski and BANK when there was no showing of any such collusion and no allegations of such collusion.

GOLD says that Court did not commit error.

4. Whether there was any material or substantial evidence presented so as to raise a material issue of fact

from which the jury could have found special damages.

GOLD answers "Yes."

5. Did the Court wrongfully grant BANK'S judgment notwithstanding the verdict of the jury as to punitive damages?

GOLD answers "Yes."

With respect to Question 5, GOLD respectfully insists that from the very nature of the interrogatory submitted to the jury and the facts in this case, the award of punitive damages to GOLD is justified. Said interrogatory is as follows:

> Special Interrogatory: Was the determination by Ronald R. Rucinski, Architect, that the apartment building and other improvements were not constructed in accordance with the Plans and Specifications and were not constructed in a good and workmanlike manner, fraudulent or so obviously unjust as to imply bad faith or gross neglect?
>
> _____ Yes _____ No

The jury correctly answered "Yes."

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NATIONAL SAVINGS BANK
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PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals
For The Sixth Circuit

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on February 13, 1981.

OPINION BELOW

The written opinion of the United States Court of Appeals for the Sixth Circuit appears in the Appendix, which case is reported in 641 F.2d 430 (6CA, 1981).

QUESTIONS PRESENTED FOR REVIEW

1. Whether there was any material or substantial evidence presented so as to raise a material issue of fact from which the jury might have rationally found a verdict in favor of GOLD in answering the special interrogatory which required a finding that Architect Ronald R. Rucinski had committed fraudulent acts, or acts so obviously unjust as to imply bad faith or gross neglect when he made his determination that the Overton Square Apartment complex was not constructed in accordance with the plans and specifications submitted to BANK and was not constructed in a good and workmanlike manner.

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>
> _____ Yes _____ No

The jury correctly answered "Yes."

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Sixth Circuit was entered on February 13, 1981, and this Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under Title 28, United States Code Annotated, Section 1332, and Rule 19(1) (b) of the Supreme Court of the United States Revised Rules.

STATEMENT OF THE CASE

This is a diversity action which arises out of a breach of agreement by Defendant, National Savings Bank of the City of Albany (BANK) to provide Plaintiffs, Freddie Gold and Wife, Goldie Gold (GOLD), a permanent loan.

As stated in the Pre-Trial Order, GOLD contends that the refusal of BANK to finance the project because the project was not constructed in a workmanlike manner was a frivolous and unfounded charge by BANK, and that the actions of BANK were fraudulent or so obviously unjust as to imply bad faith or gross neglect; and, further, that the actions performed by BANK were committed with malice, wantonness, or oppression, and GOLD prayed for punitive damages in addition to actual damages, as a result of the wrongful refusal of BANK to comply with its permanent loan commitment.

On March 6, 1973, GOLD made application to Percy Galbreath and Son, Inc. (GALBREATH) to borrow Three Hundred Thousand ($300,000.00) Dollars for the purpose of erecting an apartment complex at 1230 Overton Park Avenue, Memphis, Tennessee, the interest rate to be 8¾%.

In the same month, BANK agreed to buy the Three Hundred Thousand ($300,000.00) Dollar construction loan from GALBREATH, to be paid by GOLD over a twenty-seven-year period of time.

Paragraph 4 of the agreement between BANK and GOLD states, among other things, that BANK "... shall also have the option of designating our own representative for the purpose of inspecting the construction of the apartment building and other improvements, and

his determination as to whether such construction has been performed in accordance with the plans and specifications and as to whether such construction is in good and workmanlike manner shall be final and conclusive."

Thereafter, a construction loan agreement was entered into between GOLD and GALBREATH, which agreement provided, among other things, for the method of distributing the Three Hundred Thousand ($300,000.00) Dollars to GOLD when percentages of the construction were completed; i.e., 1.6% to be paid to GOLD when the footing was completed, 1.6% to be paid to GOLD when the foundation was completed, et cetera.

Because of inclement weather and other problems, the completion date was extended by GOLD and BANK several times, and the last extension date was November 29, 1974, which was granted conditioned upon increasing the interest rate to 9¼%.

The Constitution of the State of Tennessee limits interest rates to 10%. Arkansas and Montana are the only two other states in the Union that had this constitutional limitation on interest rates. Recognizing that Tennessee banks were seriously, adversely affected by this limitation of interest rates, a bill was introduced in the Congress by Tennessee Senator Brock; and after extended hearings before various committees in the Congress, on September 9, 1974, the United States passed a bill styled "Debt Obligations and Usury Ceiling Bill," which was Senate Bill Number 3838.

On October 8, 1974, the Senate Bill was sent to a conference committee comprising members of the United States Senate and the United States House of Representatives, and on October 11, 1974, this Bill passed both

Houses of the Congress and was signed by the President of the United States on October 28, 1974. This legislation authorized national banks to charge up to 5% above the discount rate, as established by the Federal Reserve System, with a limitation of 13½%, irrespective of the constitutional provisions of Tennessee restricting interest to 10%.

When GOLD proceeded to Albany, New York, to take the deposition of Vice President James R. Boubin, he learned that Boubin was in charge of the loan committee of BANK. In his sworn testimony, Mr. Boubin stated that he never heard of the "Brock Bill," and that BANK was not in any way affected by the application of the Brock Bill. This was an incredible statement to be made by a loan officer of a large bank, who, to a large measure, was responsible for the bank making or losing money, as he is the person responsible for establishing the interest rates to its borrowers. Later, he admitted that BANK, being an insured bank by the Federal Deposit Insurance Corporation, was governed by the provisions of the Brock Bill; and, later, he and President Fred Peters admitted that BANK subscribed to a bank publication which devoted a whole page to the application of the Brock Bill.

Several witnesses testified at the trial that from early 1973 until 1975, the state of the United States economy was in a serious recession. Interest rates were going up; foreclosures were more frequent, and even BANK testified, through its President and Vice President, that it was not making any further loans during this period of time.

GOLD alleges that during this critical period of time, BANK was awaiting the outcome of Senate Bill Number 3838, which entitled it to charge this higher interest

rate; and when it became apparent that on October 11, 1974, the Senate would pass the bill, BANK, through its President and Vice President, came to Memphis to inspect the property, and they immediately stated, in the presence of officers of GALBREATH and representatives of GOLD, that BANK would not buy this loan from GALBREATH, because there had been change in circumstances, location, and other complaints. Vice President Boubin, although later denying that he said so, stated that he and President Peters discussed the location of the apartment complex when they were on the airplane returning to Albany, New York. GOLD contends, among other things, that Boubin was objecting to "location" because the neighborhood had become integrated.

In several telephone conversations between Vice President Boubin and representatives of GALBREATH, GALBREATH'S President, Denson A. Ward, and Vice President, Frank M. Crump III, proceeded to New York to have meetings with officers of BANK, at which meetings Boubin advised GALBREATH people that there were only five objectionable items to this project, which could have readily been corrected, as testified to by GALBREATH'S officers; and even though the commitment had been extended to November 29, 1974, BANK refused to permit GOLD to correct whatever deficiencies that BANK complained of, GALBREATH'S officers stated at all times that if there were any deficiencies, the subcontractors were responsible to correct such deficiencies. GALBREATH'S officers invited officers of BANK to return and inspect the property, which they refused to do. Instead, BANK sent an architect, Ronald R. Rucinski, to Memphis to inspect the property, and Architect Rucinski came up with forty-seven alleged deficiencies in the construction of the apartment complex.

In GOLD'S cross-examination of Architect Rucinski, it was brought out that in the deposition taken of Mr. Rucinski in New York he stated that he recorded these forty-seven deficiencies without having seen the plans and specifications. However, Mr. Rucinski denied that was what he intended in his live testimony.

It is to be emphasized that President Peters and Vice President Boubin had already stated, without equivocation, that BANK was not going to buy this loan from GALBREATH, and before Mr. Rucinski was sent down to inspect the premises.

Minutes of the mortgage committee meeting indicated that on October 18, 1974, "The current policy is that the bank is not accepting mortgage application at this time, with certain exceptions."

Trial Exhibit 37 is a memorandum of Frank Crump's telephone conversation with Mr. Boubin, who stated that BANK was making "no more loans, even at higher rates, due to money going out." Trial Exhibit 38 is a memorandum of Mr. Crump's conversation with Mr. Boubin, in which Mr. Boubin tells Mr. Crump that Fred Peters was "not able to fund loan."

On November 14, 1974, the mortgage committee meeting minutes indicated that the committee decided that the loan would not be purchased. Although it was denied by Vice President Boubin, it is apparent from his testimony and the testimony of Mr. Rucinski that Boubin sent Rucinski to Memphis to "back him up" in the BANK'S refusal to purchase the loan.

Mr. Boubin stated under oath in his deposition in New York and on the witness stand that he never approved any variations from the plans and specifications,

when the record is replete with testimony of GALBREATH'S Ward, Crump, and Church that the BANK did approve variations from the plans and specifications.

In preparation for the trial, Mr. Rucinski, at the instructions of Mr. Boubin, came to Memphis and stayed several days during the trial to testify and during stormy and wet weather went to the project and with trick photography made fifty-seven Polaroid pictures of the most inconsequential importance to the construction of the apartment complex. Further, Mr. Rucinski said that he was not aware of GOLD'S right to vary the plans and specifications, which had been approved by GALBREATH and by BANK.

Mr. Rucinski testified that the property was not constructed in a good and workmanlike manner; Frank Lansky testified just the opposite, as did Denson Ward, Roger Church, and Frank Crump, all stating that the BANK should have bought this loan; and if there were any objections to the construction, they could have all been corrected and could have been corrected before the termination of the commitment, to wit: November 29, 1974.

Permit Petitioners to quote brief excerpts from the Court's colloquy with Respondent Bank's counsel as follows:

> Then, it graduated upward to almost ten percent in the latter part of 1974. A. That is correct, yes. (App. 149)

The credibility of Boubin was successfully challenged by the Court in overruling BANK'S objections, particularly in view of the "evasive" way in which Boubin responded to GOLD'S questions on the witness stand.

MR. PIOVARCY: Well, Your Honor, the whole law suit—That is a project where you have a commitment that says that the architect's inspection would be final and conclusive and the case law is clear that unless they can show some fraud that it is not a question of what this witness says, it goes beyond that.

THE COURT: I don't agree with that. We have a definite question as to whether it was done in a good and workmanlike manner and I don't believe it is simply a question of your architect's opinion. I think that particularly in the light of your witness' or your client's testimony yesterday. I think they do definitely have a question of a good and a workmanlike manner.

MR. BLACK: And another thing, if the Court please, what it says is that they have a right to send somebody to inspect it.

THE COURT: I know it.

MR. MARSTON: And it does say it is final and binding; that is what the contract says.

THE COURT: All right, but it doesn't say that you get to hire an architect to support an opinion. We already have a conflict and I think a wrong impression was made on the basis (App. 166) of *Mr. Boubin's testimony yesterday and his evasiveness and other things.*

On the trial of the cause, the Honorable Robert McRae, Jr., Judge submitted one special interrogatory to the jury as follows:

Was the determination by Ronald R. Rucinski, Architect, that the apartment building and other improvements were not constructed in accordance with the Plans and Specifications and were not constructed in a good and workmanlike manner,

fraudulent or so obviously unjust as to imply bad faith or gross neglect?

Yes _____ No _____

The jury answered the special interrogatory "Yes."

The Court then instructed the jury on the issue of compensatory damages and punitive damages. The jury returned a verdict in favor of GOLD in the amount of One Hundred Fifty Thousand ($150,000.00) Dollars compensatory damages and Fifty Thousand ($50,000.00) Dollars punitive damages.

BANK filed a motion for a judgment nothwithstanding the verdict or, in the alternative, motion for new trial based upon several grounds as recited therein.

Initially, the Trial Court entered an amended judgment allowing a remittitur of One Hundred Thousand ($100,000.00) Dollars of the Two Hundred Thousand ($200,000.00) Dollar total judgment and awarded no punitive damages.

After additional briefing and a non-evidentiary hearing, the Trial Judge entered a final corrected judgment granting a Fifty Thousand ($50,000.00) Dollar remittitur of the One Hundred Fifty Thousand ($150,000.00) Dollar jury award of compensatory damages and granting a judgment notwithstanding the verdict as to the issue of punitive damages.

BANK timely filed its notice of appeal as to the jury's determination on the special interrogatory and as to the award of damages in any amount. GOLD did not appeal the remittitur of Fifty Thousand ($50,000.00) Dollars but timely filed its cross-appeal as to the Trial

Court's decision to grant a judgment N.O.V. with respect to the punitive damages awarded by the jury.

REASONS FOR GRANTING THE PETITION

Petitioners contend that there was ample and material proof to sustain the allegations that the apartment building was constructed in accordance with the plans and specifications, and that the jury was correct in concluding that the actions of the architect were "... fraudulent or so obviously unjust as to imply bad faith or gross neglect."

The Court of Appeals reversed the District Court and stated that the Court should have granted defendant's motion for judgment n.o.v. with respect to the award of compensatory damages and affirmed the decision of the Trial Court while granting judgment n.o.v. on the question of punitive damages.

The Court went on to state that in diversity cases the Federal Courts are bound by state law in determining whether there is sufficient evidence to support a jury's verdict (citing cases.) The Court of Appeals, however, in its Footnote Number 3 to its opinion on Page 8, stated that there is currently a circuit split on the issue of whether federal or state law controls in diversity cases when determining if sufficient evidence has been presented to withstand a motion for judgment n.o.v. and cited cases.

The Court of Appeals went on to say, however, that there was no probative evidence of fraudulent intent on the part of the defendant and cited various Sixth Circuit and Tennessee cases stating that there must be substantial and material evidence from which the jury could have based a verdict for the prevailing side.

In the case of *Wratchford* v. *S. J. Groves & Sons Company*, 405 F.2d *1061* (4CA, 1969), *the Court stated that where federal jurisdiction is based upon diversity, federal standard is to be applied by Court in determining sufficiency of evidence to go to jury.* The Court went on to state as follows:

> *The Supreme Court has left undecided the question of the standard to determine the sufficiency of the evidence to go to the jury in a diversity case brought in the federal court.*

The Court went on further to state:

> *The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.*
>
> * * *
>
> *An equally grave disruption of the federal system would result from the application of state law rules as to the sufficiency of evidence to go to the jury. Indeed, it has been suggested, not without reason, that the Seventh Amendment commands application of federal rather than state law here. Faith in the ability of a jury, selected from a cross-section of the community, to choose wisely among competing rational inferences in the resolution of factual questions lies at the heart of the federal judicial system. That faith requires consistency within the system and does not permit the accommodation of more restrictive state laws.*

Again, in the case of *Boeing Company* v. *Shipman*, 411 F.2d 365, 369, 370 (5CA, 1969), the Court stated

that it is well settled in this circuit that in diversity cases Federal Courts apply a federal rather than a state test for the sufficiency of evidence to create a jury question. The Court went on to state as follows:

> In *Planters*, supra, Judge Tuttle exhaustively discussed this issue and pointed out (380 F.2d at 870-871) that *although the Supreme Court had not yet resolved the question in favor of the federal test*, that Court had said in Byrd v. Blue Ridge Rural Electric Cooperative, (citing cases):
>
> > "It cannot be gainsaid that there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts."
> >
> > * * *
>
> Federal courts must be able to control the fact-finding processes by which the rights of litigants are determined in order to preserve "the essential character" of the federal judicial system. Of course, we do not contend that this control will not affect state-created substantive rights in some cases. Ultimately, however, the integrity of our fact-finding processes must outweigh considerations of uniformity.

In the case of *Eckles* v. *Sharman*, 548 F.2d 905, 909 (10CA, 1977), the Court stated:

> We have repeatedly held that a verdict may not be directed unless the evidence all points one way and is susceptible of no reasonable inferences which sustain the position of the party against whom the motion is made.

In the case of *Duchesne* v. *Sugarman*, 566 F.2d 817, 829, (2CA, 1977), the Court stated:

> The test to be applied when a motion to direct a verdict has been granted is as follows:

> "The motion (should) be granted only if (1) there is a complete absence of probative evidence to support a verdict for the non-movant or (2) the evidence is so strongly and overwhelmingly in favor of the movant that reasonable and fair minded men in the exercise of impartial judgment would not arrive at a verdict against him (citing cases)."

In the case of *Gauck* v. *Meleski*, 346 F.2d 433, 436 (5CA, 1965), the Court, in reversing the Trial Court's granting of a summary judgment, stated as follows:

> It is our conclusion that, according to Rule 56(e) as amended, the trial court can, and indeed should, assess the evidence presented upon the motion for summary judgment to determine its admissibility and to ascertain whether all the admissible evidence creates a genuine, material dispute of facts. *The trial court should be very careful, however, to avoid assessing the probative value of any evidence presented to it, for this would be an unwarranted extension of the summary judgment device. Assessment of the probative value of evidence is properly the function of the jury or the judge sitting as a trier of facts.*

In the case of *Anderson* v. *Hudspeth Pine, Inc.*, 299 F.2d 874, 876 (10CA, 1962), the Court stated:

> With the exception of clearly incredible evidence, the court should not consider or pass on the credibility of witnesses and should accept as true the evidence in favor of the party against whom the motion is directed.

Supreme Court Rule 17 provides that a review on writ of certiorari is not a matter of right, but a judicial discretion, and will be granted when only there are special and important reasons therefor. This rule indicates the character of reasons that the Court will con-

sider, among other things, that when a Federal Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision. Subparagraph (c) also states that when a Federal Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, certiorari may be granted.

Petitioners refer the Court to the cases of *St. Paul at Chase Corporation, et al* v. *The Manufacturers Life Insurance Company, et al*, 278 A.2d 12; Md. C.A., May 17, 1971; 262 Md. 192; and *Selective Builders, Inc.* v. *Hudson City Savings Bank*, 349 A.2d 564, decided by the Superior Court of New Jersey on December 2, 1975. The facts of these two cases are in close analogy to the facts in the instant case.

The *St. Paul* case was an action arising out of defendant corporation's cancellation of commitment it had made for permanent financing of an apartment building to the plaintiff. Like the instant case, the loan committee contained a provision that the insurance company required a report from its architect that the apartment complex had been completed in accordance with the plans and specifications, and that the insurance company had to approve the same. Like the instant case, Manufacturers sent a photographer to photograph the building to substantiate its position that the apartment building was not substantially completed, and this is what the Court stated:

> *You can bet your bottom dollar if there was substantial evidence of incompletion of the project on*

the remaining floors other than the first floor, there would have been photographs of that state of incompleteness. He had been asked by Weaver, according to his own testimony, to take photographs showing what had not been completed.

* * *

I am persuaded beyond any doubt that the reason for the cancellation of this contract was, first, a calculated risk taken by Manufacturers that if it didn't accept the roll over, and if the construction mortgage were foreclosed, and if Manufacturers were sued, that it could weather the storm, either by avoiding liability completely, or if subjected to liability, by minimizing damages. They took that calculated risk, and they're stuck with the result.

CONCLUSION

Petitioners respectfully submit to this Court that, there being a diversity of opinions with respect to the quantum and degree of proof in the various Federal Courts of Appeals, this case is a proper case for this Honorable Court to grant Petitioners' application for a writ of certiorari to the Sixth Circuit Court of Appeals.

It is to be emphasized that the Respondent Bank renounced its loan to Petitioners even before the date agreed upon for the completion of the apartment complex.

Architect Rucinski testified that the property was not constructed in a good and workmanlike manner. Frank Lansky, a competent architect, testified just the opposite, as did officers of The Galbreath Company, which loaned Petitioners temporary construction money. The jury was out only approximately twenty-five minutes before it returned a verdict in behalf of Petitioners, and this record is replete with testimony to the effect

that the building was constructed in accordance with the plans and specifications and was constructed in a good and workmanlike manner, and that the actions of Architect Rucinski, in collaboration with officers of Respondent Bank, were fraudulent or so obviously unjust as to imply bad faith or gross neglect.

In conclusion, Petitioners respectfully allege that the proof in this case is overwhelming to support the verdicts of the jury and the judgment of the Trial Court in awarding Petitioners One Hundred Thousand ($100,000.00) Dollars, and that the same should be affirmed.

Petitioners respectfully submit that the Court was in error in granting Respondent's motion for a judgment notwithstanding the verdict of the jury, and that this Honorable Court should reinstate the Fifty Thousand ($50,000.00) Dollars in punitive damages awarded Petitioners.

This eleventh day of May, 1981.

Respectfully submitted,

Charles G. Black
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Suite 2901, 100 North Main Building
Memphis, Tennessee 38103
(901) 525-4618

CERTIFICATE OF SERVICE

I, Charles G. Black, hereby certify that I have served three copies of the foregoing Petition upon Respondent herein, by hand-delivering same to its attorneys of record, MARTIN, TATE, MORROW & MARSTON, P. C., 705 Union Planters National Bank Building, 67 Madison Avenue, Memphis, Tennessee 38103, on this thirteenth day of May, 1981.

_____

Charles G. Black

APPENDIX

Nos. 79-1039-40

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FREDDIE GOLD and wife, GOLDIE GOLD, *Plaintiffs-Appellees, Cross-Appellants,* v. NATIONAL SAVINGS BANK OF THE CITY OF ALBANY, *Defendant-Appellant, Cross-Appellee.*	APPEAL from the United States District Court for the Western District of Tennessee.

Decided and Filed February 13, 1981.

Before: EDWARDS, Chief Judge; KEITH and BROWN, Circuit Judges.

KEITH, Circuit Judge. This diversity case arises out of the alleged breach of a permanent financing agreement by the defendant bank. In answering a special interrogatory, the jury below found that the bank acted fraudulently in refusing to make a permanent loan to the plaintiffs. The jury awarded the plaintiffs $150,000 compensatory and $50,000 punitive damages. The district court, however, granted a judgment n.o.v. regarding the punitive damages and ordered remittitur of $50,000 of the compensatory damages. Both parties appealed. For the reasons discussed below, we affirm the district court's judgment n.o.v. with respect to the punitive damages and reverse the district court's decision not to grant judgment n.o.v. with respect to the compensatory damages.

FACTS

I

Plaintiff Freddie Gold, a Memphis real estate developer, approached Percy Galbreath & Sons, Inc., a mortgage banking institution located in Memphis, regarding construction financing of a 32 unit apartment complex in Memphis known as the Overton Square Apartments. Gold had been in the real estate development business for at least 12 years, and for most of that time had used Galbreath both to provide construction financing for his various projects and to locate permanent financing from third parties.

Gold filed his application with Galbreath in the instant case on March 6, 1973. The application called for a 15 month construction loan for $300,000 at 8¾% interest, and as in most of the previous deals between Gold and Galbreath, the latter would be responsible for arranging permanent financing when the apartment complex was completed. It was contemplated that the permanent loan for the apartment complex would have a term of 27 years at 8¾% interest *per annum*. The application also contained the following clause with regard to the permanent loan:

> Final working plans and specifications are to be satisfactory to the permanent lender prior to the beginning of construction. Completion of construction will be evidenced by periodic inspections and final approval by the architect, by the lender's representatives and by the municipal authorities.

Later, Galbreath secured a written commitment for permanent financing of Gold's apartment complex from Defendant National Savings Bank of the City of Albany. This commitment incorporated the terms specified in Gold's application to Galbreath. However, paragraph four of the agreement between the bank and Galbreath also provided that the bank's

obligation to fund the permanent loan was conditioned on the following:

> The apartment building and other improvements located on the mortgaged premises are to be constructed in a good and workmanlike manner and in accordance with the plans and specifications submitted by you to us. At the completion of the construction of the apartment building and other improvements, we shall be furnished with a certification by your architect that the building has been constructed in accordance with such plans and specifications. We shall also have the option of designating our own representative for the purpose of inspecting the construction of the apartment building and other improvements and his determination as to whether such construction has been performed in accordance with the plans and specifications and as to whether such construction is in a good and workmanlike manner shall be final and conclusive.

On April 6, 1973, Galbreath issued its written commitment to provide the loan package sought by Gold. In addition to providing construction financing, Galbreath agreed to arrange permanent financing under the terms and interest rates originally specified by Gold. However, this commitment contained language identical to that of paragraph four of the Bank-Galbreath agreement which conditioned the obligation of the permanent lender to fund the loan upon the completion of the apartment complex in a manner satisfactory to the permanent lender.

The Galbreath written commitment, which was approved by Gold later, also provided that:

> In the event the apartment building and other improvements on the mortgaged premises are not completed in accordance with the provisions of this letter of committment by January 31, 1974, or any other term or condition of this letter of committment is not fulfilled by January

> 31, 1974, National Savings Bank's commitment to make the mortgage shall, at their option, terminate.

Although Gold had agreed to have the apartment complex completed by January 31, 1974, he was not able to meet the completion date. Galbreath, however, agreed to extend construction financing beyond the January 31, 1974, date and until Gold actually completed the complex. In return, Galbreath increased the interest rate on the construction loan from the original 8¾% rate to 10% *per annum*. The bank also extended its committment. Under the terms of the agreements between the parties, the bank was entitled to terminate its obligation to provide financing since the complex was not completed by January 31, 1974, but instead the bank extended its commitment on five separate occasions. In return, the bank increased the rate of interest charged for the permanent financing from the original 8¾% to 9½%.

When Gold finally completed the apartment complex, Galbreath notified the defendant bank. Officials of the bank then arranged an inspection visit so that they could determine to their satisfaction if the complex had been constructed in accordance with the plans and specifications. Bank vice-president R. Boubin and Mr. Peters, a trustee of the bank, arrived in Memphis on October 10, 1974, as part of a multi-state inspection trip that included inspections in Green Bay, Wisconsin, and Knoxville, Tennessee, as well as inspections of other properties in Memphis.

During the course of the two-hour inspection of Gold's apartment complex, Boubin and Peters found a number of apparent deficiencies in the construction of the complex. In their view, these deficiencies were so substantial that construction of the complex could not be deemed in compliance with the plans and specifications. The day after the inspection the defendant bank informed Galbreath that it would not be able to fund the loan because of the deficiencies.

A short time later, Galbreath informed the bank that struc-

tural corrections had been made on the complex since the October 10th inspection. Galbreath took the position that the complex was now in compliance with the plans and specifications. Pursuant to paragraph four of the Galbreath committment with the bank, the parties agreed that the bank should select an architect to determine if the complex had been built in a workmanlike manner and in accordance with the plans and specifications. The architectural firm of Donald J. Stephens Associates, Albany, N.Y., was chosen, and Ronald R. Rucinski, a partner in the firm, came to Memphis on October 30-31 to make the inspection. He found 47 examples of unworkmanlike construction. Therefore, on November 19, 1974, the bank wrote Galbreath and advised that it would not fund the loan.

Gold continued to own the property from November 19, 1974, to March 1976, when he conveyed the apartment complex to Galbreath by deed in lieu of foreclosure. On December 31, 1974, Gold filed this suit against the National Savings Bank of the City of Albany.

II

In his complaint, Gold alleged that the defendant bank wrongfully and willfully breached its contract, under the terms and conditions of the permanent loan committment, by fraudulently declining to fund the loan. The fraud alleged in the complaint was based on the belief that the bank intentionally refused to fund the loan because it wanted to take advantage of higher interest rates made possible by passage of the "Brock Bill."[1] At trial, Gold contended that the bank's ex-

[1] On October 29, 1974, the United States Congress passed and the President signed a Bill entitled the Debt Obligation and Usury Ceiling Act, commonly referred to as the "Brock Bill." Pub.L. No. 93-501, 88 Stat 1552 (1974). Under this legislation national banks were permitted to charge interest rates not to exceed 13½% per annum in states, such as Tennessee, which had constitutional limits of 10% on permissible interest charges.

planation that it decided not to fund the loan because of noncompliance with plans and specifications was only pretextual.[2]

The district court correctly ruled that *Railroad* v. *Central Lumber and Manufacturing Co.*, 95 Tenn. 538, 32 S.W. 635 (1895), provided the applicable law in this case. In that decision the Supreme Court of Tennessee opined that:

> where parties to a construction contract of any kind agree to submit differences, questions of any character arising in connection with the work to the decision of an architect or engineer, the decision of the arbiter thus selected is final, all parties are bound by it unless it be shown that the estimate or conclusion is fraudulent or is so excessive or palpably injust as to imply bad faith or gross neglect. *Id.* at 543.

After all the evidence was introduced at trial, the district court denied the bank's motion for directed verdict and submitted the following special interrogatory to the jury:

> Was the determination by Ronald R. Rucinski, Architect, that the apartment building and other improvements were

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[2] During his Opening Statement at trial, counsel for the plaintiffs stated:

> There is a provision in the contract that says they (the bank) have a right to come down and inspect the property (the apartment complex). And I believe the language of that section . . . says that their inspection of the property and their judgment is final. They have the right to come down and say 'We like it' or 'We don't like it, we ain't going to buy the loan' . . . so Gold, right after the Jewish Holiday was over, went out there and corrected and I hope the proof will show and I think it will show that all of the deficiencies set out by these inspectors and Mr. Ruzinski who was sent down to inspect this property were either frivolous or so minor that it wasn't justification for canceling or not buying the loan.

However, the plaintiffs failed to make this showing of frivolity during the trial and failed to introduce other evidence that would have supported an inference of fraudulent intent on the part of the bank or its architect. Rather than being frivolous citations, the 47 deficiencies noted by Rucinski included: (1) an absence of handrails on exterior concrete stairs; (2) "hundreds" of half-inch drilled holes in the exterior siding of the building which would permit water and moisture to enter the walls which would eventually cause delamina-

not constructed in accordance with the plans and specifications and were not constructed in a good and workmanlike manner fraudulent or so obviously unjust as to imply bad faith or gross neglect?

Yes ____ No ____

The jury answered the interrogatory "Yes", finding that Rucinski's determination had been made in bad faith. After hearing the parties' arguments with respect to damages, the jury awarded $150,000 compensatory and $50,000 punitive damages. However, the district court partially granted the bank's motion for judgment n.o.v. It struck down the punitive damage award and ordered remittitur of $50,000 of the compensatory award. We agree with this ruling.

The district court, however, did not grant the bank's motion for judgment n.o.v. with respect to the jury's compensatory award. Accordingly, the issue presented to this court on appeal is whether there is sufficient evidence in the record to support the jury's finding that the bank's architect, Ronald R. Rucinski, acted in bad faith in determining that the apart-

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tion of the plywood and permit moisture to enter the insulation; (3) exterior corners of the plywood were butt jointed together without caps which would permit water to enter the plies of plywood causing delamination; (4) a large number of electrical conduits were not sealed to prevent the entrance of water; (5) no safety disconnect switches on airconditioners; (6) hazardous tripping conditions on certain stairwells; (7) non-compliance with the plans and specifications in the roof decking; (8) missing and faulty drain pipes; (9) unaccessible hot water heater valves; (10) absence of drain pans under certain water heaters; (11) faulty installation of insulation; (12) an inadequate amount of insulation; (13) faulty installation of toilet ducts; (14) faulty construction of certain firewalls; (15) faulty construction of certain heating unit closets and related ductwork; (16) inadequate support in the roofing of the complex; and (17) deviations from the prescribed design of the roof. In fact, as the bank points out in its brief, 29 of the deficiencies noted by Rucinski were also found by Gold's architect, Frank Lansky. Although the plaintiffs called some 18 witnesses during the course of the trial, they did not establish either indirectly or directly that Ruzinski's report was given in bad faith or that the bank otherwise fraudulently refused to fund the permanent loan.

ment complex was not constructed in accordance with the plans and specifications. For the reasons discussed below, we find that the jury's determination was not supported by sufficient evidence.

A

It is well settled in this circuit that in diversity cases the federal courts are bound by state law in determining whether there is sufficient evidence to support a jury's verdict. *See Standard Alliance Industries* v. *The Black Clawson Co.*, 587 F.2d 813, 812-4 (6th Cir. 1978), *cert. denied*, 441 U.S. 923 (1979); *Chumbler* v. *McClure*, 505 F.2d 489 (6th Cir. 1974); and *Wallace* v. *Louisville and Nashville Railway Co.*, 332 F.2d 97 (6th Cir. 1974).[3] In Tennessee, the rule of law with respect to appellate review of the sufficiency of evidence is that all the evidence for the prevailing party must be taken as true. Moreover, all reasonable inferences favorable to the prevailing party must be made and all countervailing evidence must be disregarded. *See Phelps* v. *Magnavox Co. Of Tennessee*, 497

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[3] There is currently a circuit split on the issue of whether federal or state law controls in diversity cases when determining if sufficient evidence has been presented to withstand a motion for judgment n.o.v. *Compare, e.g., Wratchford* v. *S. J. Groves and Sons Co.*, 405 F.2d 1081 (4th Cir. 1969), and *Kuzin* v. *Lake Engineering Co.*, 586 F.2d 33 (7th Cir. 1978). *See also* Annot. 10 ALR Fed. 451, 5A Moore's Federal Practice ¶ 50.06 and 7 Wright & Miller § 2525.

While this circuit has continued to hold that state law determines the sufficiency of the evidence in diversity cases, *see, e.g., Garrison* v. *Jervis B. Webb Co.*, 583 F.2d 258 (6th Cir. 1978), we have not had occasion to closely examine this issue since *Hanna* v. *Plummer*, 380 U.S. 460, 466-69 (1965). We note, however, that the continued vitality of this rule is open to question, especially in light of *Donovan* v. *Penn Shipping Co.*, 429 U.S. 648 (1977) ("The proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is, however, a matter of federal law.") In fact, several circuits which followed this rule earlier now hold that federal law controls. *See, e.g., Denneny* v. *Spiegel*, 407 F.2d 433 (3rd Cir. 1969), and *Oldenburg* v. *Clark*, 489 F.2d 839, 841 (10th Cir. 1974).

In this case, as the text of the opinion makes clear, application of either state or the federal rule mandates a judgment for the defendant, since there was no probative evidence of fraudulent intent on the part of the defendant or its architect introduced at trial.

S.W.2d 898 (Tenn. App. 1972). However, it is also clear that under Tennessee law there must be substantial and material evidence from which the jury could have based a verdict for the prevailing side. *Id. See also Camurati* v. *Sutton*, 48 Tenn. App. 54, 342 S.W.2d 732 (1960), and *Cude* v. *Culberson*, 30 Tenn. App. 628, 209 S.W.2d 506 (1947).

Upon a review of the record in the case, we have found no evidence, much less substantial evidence, to support the jury's affirmative answer to the special interrogatory submitted by the court. The plaintiff did introduce evidence showing that the bank refused to fund the permanent loan at around the same time that the Brock Bill was enacted by Congress, but this fact alone is plainly insufficient to support an inference that the bank's architect inspected the apartment complex with bad faith. The plaintiff introduced no direct evidence of any fraudulent behavior on the part of Rucinski. In fact, there was no evidence introduced showing that bank officials or Rucinski ever discussed the Brock Bill in connection with Gold's apartment complex project. Finally, there was no evidence introduced of any fraudulent intent or motivation on the part of Rucinski to wrongfully issue an unfavorable report on the quality of the workmanship of the construction project.

Without considering the substantial countervailing evidence supporting the bank's view of the transaction and taking the evidence introduced by Gold in the light most favorable to him, there is still inadequate evidentiary support for a judgment in favor of the plaintiff. As the Tennessee Supreme Court has noted in *Jones* v. *Seal*, 56 Tenn. App. 593, 409 S.W. 2d 382 (1966), "the facts and circumstances proved [at trial] must clearly establish the inference of fraud." 409 S.W.2d at 385. *See also Anderson* v. *Nichols*, 39 Tenn. App. 503, 286 S.W.2d 96 (1955). A jury cannot render a verdict on the basis of speculation, surmise or conjecture. *See Dayton Veneer & Lumber Mills* v. *Cincinnati N.O.&T.P. Railway Co.*, 132 F.2d 222 (6th Cir. 1942); *Cecil Corley Motor Co., Inc.* v. *General*

Motors Corp., 380 F.Supp. 819 (M.D. Tenn. 1974), and *Groves* v. *Witherspoon*, 379 F.Supp. 52 (E.D. Tenn. 1974). Therefore, the district court should have granted the defendant's motion for judgment n.o.v. with respect to the award of compensatory damages.

Accordingly, the decision of the district court granting judgment n.o.v. on the question of punitive damages is affirmed and the decision denying judgment n.o.v. on the question of compensatory damages is reversed.